TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 77.

AMERICAN EXPRESS COMPANY, PLAINTIFF IN ERROR,

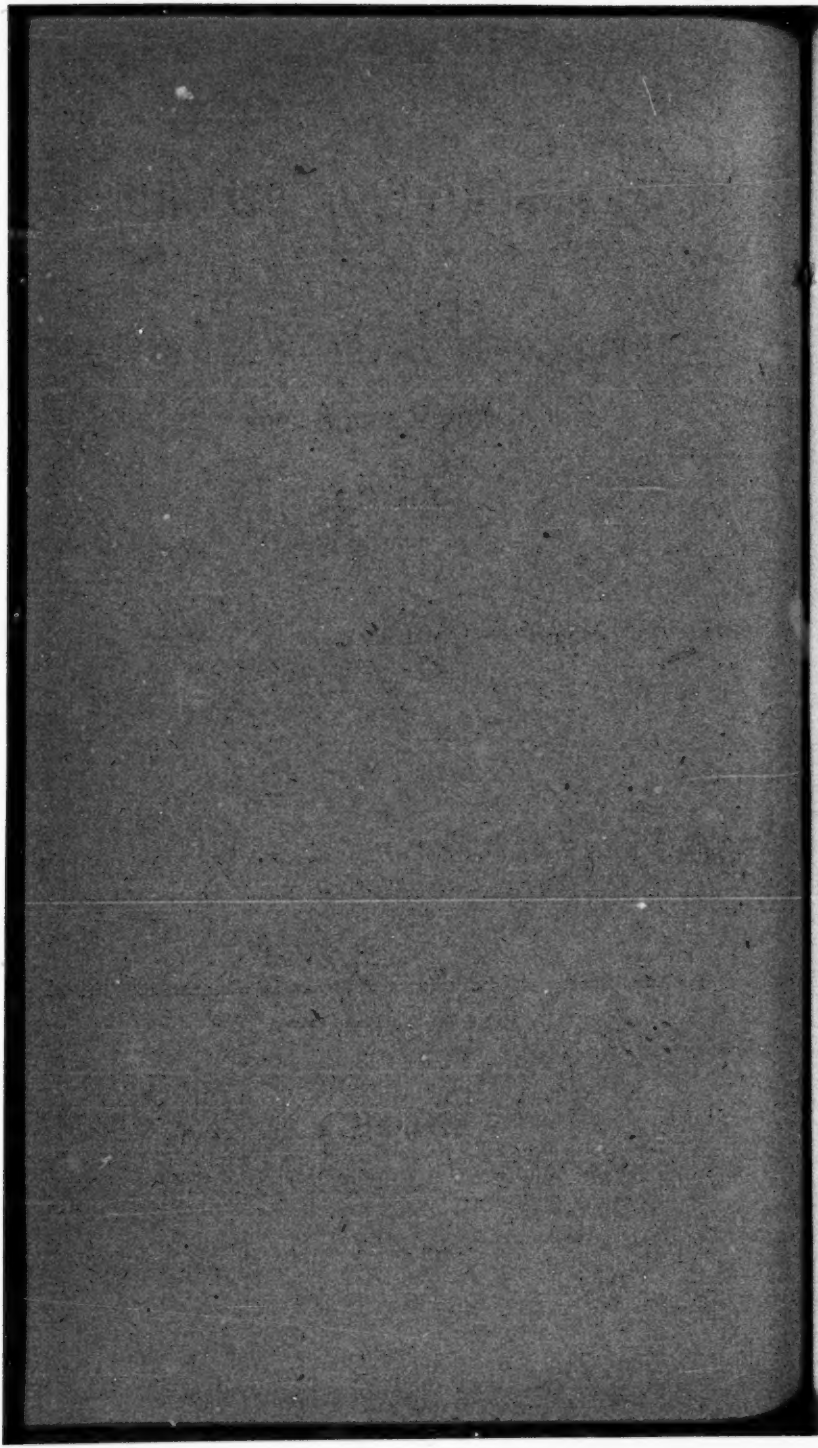
vs.

A. R. MULLINS.

IN ERROR TO THE CIRCUIT COURT OF KENTON COUNTY, STATE OF KENTUCKY.

FILED MAY 4, 1907.

(20,697.)



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INDEX.

	Original.	Print.
on	1	1
on	1	1
ions	4	3
dant filed an answer	4	3
er	4	3
iff filed demurrer to answer	7	4
rrer	7	4
nued	8	4
itted as of Nov. 15, 1905, on briefs on demurrer to answer	8	5
rrer overruled; plaintiff excepts	8	5
overruling demurrer set aside	8	5
rrer to answer sustained, defendant excepts, and leave given mend	8	5
dant filed amended answer	8	5
ded answer	8	5
xhibit—Record from district court of Labette county, Kansas, in case of State of Kansas *vs.* John Doe	11	7
Information	11	7
Warrant for seizure	13	8
Notice of seizure	15	9
Order for continuance	17	10
Judgment	18	10
Judge's certificate	20	11
Clerk's certificates	20	12

DD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 24, 1908.

	Original.	Print.
Demurrer to answer as amended filed	22	12
Demurrer	22	12
Demurrer to amended answer sustained; leave given defendant to amend	22	13
Defendant filed second amended answer	22	13
Second amended answer	22	13
Plaintiff filed demurrer to answer as to first and second amended	25	14
Demurrer	25	14
Continued	25	14
Continued	25	15
Submitted	25	15
Court files an opinion; demurrer to answer sustained; defendant excepts	25	15
Opinion	26	15
Plaintiff filed motion for judgment	33	19
Motion for judgment	33	19
Continued	33	19
Submitted	33	19
Judgment	33	19
Defendant filed petition for writ of error, &c	33	19
Order granting writ of error	33	19
Petition for writ of error	34	20
Defendant filed writ of error, &c	35	20
Defendant filed bond	35	21
Writ of error (copy)	36	21
Bond	38	22
Citation and service (copy)	39	23
Certificates to transcript of record	41	23
Citation and service (original)	42	24
Writ of error (original)	44	25

1 Pleas Before the Honorable the Kenton Circuit Court, at the Court House, in Covington, on the 25th Day of March, 1907, Hon. M. L. Harbeson, Judge.

A. R. MULLINS

agst.

AMERICAN EXPRESS COMPANY.

Be it remembered that on the 11th day of September, 1905, plaintiff filed his petition herein, which is as follows:

Petition.

Kenton Circuit Court.

A. R. MULLINS, Plaintiff,

vs.

AMERICAN EXPRESS COMPANY, Defendant.

Petition.

The plaintiff says that he is now and has been continuously for many years last past engaged in the wholesale whiskey business in Covington, Kentucky; that the defendant the American Express Company is a corporation organized under the laws of the State of New York, and invested with all the rights, powers, duties and responsibilities of a common carrier, and is now and has been continuously for more than five years last past engaged in conveying and transporting packages of merchandise for profit from one point to another throughout the United States; that on the 19th day of March, 1904, the defendant undertook and agreed with plain-
2 tiff, in consideration of certain rates paid to it in good and lawful money of the United States to convey, transport and deliver to certain parties in the City of Oswego in the State of Kansas, twenty (20) packages of whiskey, containing one gallon each, of the value of Four ($4.00) dollars per packages, and to collect the money therefor and pay it over to this plaintiff, and in pursuance of said agreement and in the regular course of trade, this plaintiff, on the day aforesaid, delivered to the defendant the following packages to be transported and delivered as per said agreement:—

1904.			
M'ch 19th.	1	package to Fred Perkins, Oswego, Kans. C. O. D.	$4.00
	1	" " C. E. Wiggins " " "	4.00
	1	" " E. L. Burton	4.00
	1	" " E. B. Morgan " " "	4.00
	1	" " Nelson Case " " "	4.00
	1	" " Elmer Liggett " " "	4.00
	1	" " Chas. Klein " " "	4.00
	1	" " Steve Miller " " "	4.00
	1	" " Tom Miller " " "	4.00
	1	" " Kate Miller " " "	4.00
	1	" " John Miller " " "	4.00
	1	" " Sam Williams " " "	4.00
	1	" " K. J. Martin " " "	4.00
	1	" " Alf Carpenter " " "	4.00
	1	" " Will Richardson " " "	4.00
	1	" " Mert Moore " " "	4.00
	1	" " Frank Ruffenberg " " "	4.00
3	1	package to George Dearhart, Oswego, Kans. C. O. D.	4.00
	1	" " George Miller " " "	4.00
	1	" " Kingsburg Fink " " "	4.00
		Total	$80.00

Plaintiff says that the defendant took all of said packages from plaintiff- place of business in Covington, Kentucky, on the 19th day of March, 1904, in accordance with the agreement aforesaid, but he says defendant has not complied with said contract, because it has failed to deliver said merchandise or to collect the money therefor, or to return the property or any part of it to this plaintiff.

He now says that said merchandise was reasonably worth the sum of Eighty ($80.00) dollars, and the defendant is by reason of the premises indebted to him in that sum.

Wherefore he prays judgment against the defendant in the sum of Eighty ($80.00) dollars, for costs and all proper relief.

FENLEY & GREEN,
Attorney- for Plaintiff.

A. R. Mullins says the statements of the foregoing petition are true as he verily believes.

A. R. MULLINS.

Subscribed and sworn to before me by A. R. Mullins this 26 day of August 1905.

T. W. SANDFORD,
Notary Public.

[SEAL.]

My commission expires Aug. 8th, 1908.

4 & 5 Thereupon on same day a summons issued and was afterwards returned as follows:—

Summons.

The Commonwealth of Kentucky to the Sheriff of Kenton County:

You are commanded to summon American Express Company to answer in twenty days after the service hereof, a petition in ordinary, in suit numbered 8302 filed against it in the Kenton Circuit Court at Covington, by A. R. Mullins and warn its officers that upon failing to answer, the said petition will be taken as confessed, or it will be proceeded against for contempt.

Witness, the Clerk of said Court, this 11th day of Sept., 1905.

FRANK A. DROEGE, *Clerk,*
By CAMPBELL ELLIS, *D. C.*

Executed the within Summons by delivering to Chas. Wagner Driver of the American Express Company there being no officer or agent of said Company found in my County Sept. 14, 1905.

M. D. McINERNEY, *S. K. C.,*
By JOHN O'MEARA, *D. S.*

At a sitting of said Court on Oct. 2nd, 1905:

Def't Filed an Answer.

"Defendant filed in Clerk's office an answer."
Said answer is as follows:—

Answer.

American Express Company, an association, erroneously sued as a corporation, says that the packages of whiskey mentioned in the petition were carried by it to Oswego in the county of Labette, State of Kansas, and on or about the 24th day of March,
6 1904, were seized by the Sheriff of said county upon a warrant, with seizure clause attached, duly issued out of the District Court of Labette County, Kansas, directed to said sheriff, and were by him taken out of its possession, it not being a person legally authorized to sell intoxicating liquors.

Said warrant was duly issued upon the complaint of the State of Kansas, in a cause pending in said District Court wherein the State of Kansas was plaintiff and John Doe, whose true name is unknown, was defendant, being cause No. 1677 on the docket of said court. Said court had jurisdiction of said cause; was authorized to issue said warrant and said warrant was valid on its face.

On or about said 24th day of March, 1904, a notice was duly issued out of said court notifying said defendant, John Doe, and any and all persons claiming any interest in said packages of whiskey to appear in said court at 9 o'clock A. M. on the 15th day of April, 1904, and answer the complaint made against said packages of

whiskey so seized, as aforesaid, and to show cause why the same should not be forfeited and destroyed. Said notice was duly served upon this defendant, and a true copy thereof duly posted in the office of this defendant where said liquor was seized.

On or about the 28th day of March, 1904, defendant duly notified plaintiff that said packages of whiskey had been seized, as aforesaid, and served upon plaintiff a true copy of the notice issued as aforesaid out of said District Court on the 24th day of March, 1904; and on the 31st day of March, 1904, plaintiff acknowledged receipt of said notices and advised defendant that he intended to contest the legality of said seizure.

7 Thereafter on or about the 15th day of April, 1904, said District Court entered a judgment declaring said packages of whiskey forfeited and ordering same destroyed, which judgment was subsequently executed, and said packages of whiskey destroyed.

Defendant says that said judgment is entitled to full faith and credit under the Constitution and laws of the United States.

MAXWELL & RAMSEY,
Attorneys for Defendant.

STATE OF OHIO, *Hamilton County, ss:*

C. G. Kingsbury, being first duly sworn, says that he is the agent of the American Express Company and believes that the allegations of the foregoing answer are true.

C. G. KINGSBURY.

Sworn to and subscribed before me this 2nd day of October, 1905.

[SEAL.] JOHN R. SCHINDEL,
Notary Public, Hamilton Co., O.

At a sitting of said Court on Oct. 24th, 1905:

Pl'ff Filed Demr. to Answer.

"Plaintiff filed in Clerk's office demurrer to Answer."

Said demurrer is as follows:—

Demurrer.

The plaintiff demurs to the answer because it does not state facts sufficient to constitute a defense.

W. M. FENLEY, *For Pl'ff,*
MAXWELL & RAMSEY, *Contra.*

8 At a sitting of said Court on Oct. 30th, 1905:

Continued.

"The demurrer to the answer is continued until November 6th, 1905."

At a sitting of said Court on Nov. 6th, 1905:

Subm. as of Nov. 15, 1905, on Briefs on Demr. to Ans.

"The demurrer to answer is submitted on briefs November 15th, 1905."

At a sitting of said Court on Nov. 22nd, 1905:

Dmr. Overruled, Pl'ff Exc.

"Demurrer to answer overruled, plaintiff excepts."

At a sitting of said Court on Nov. 24th, 1905:

Order Overruling Demr. Set Aside.

"The order overruling demurrer is set aside."

At a sitting of said Court on Feb. 7th, 1906:

Demr. to Ans. Sust'd Def't Exc. and Leave Given to Amend.

"The demurrer to answer is sustained the defendant excepts, and is given leave to amend."

At a sitting of said Court on Feb. 12th, 1906:

Def't Filed Amd. Ans.

"The defendant filed in open court amended answer."

Said amended answer is as follows:—

Amended Answer.

American Express Company, an association, erroneously sued as a corporation files its amended answer, after leave obtained from the court and says that the packages of whiskey mentioned in the petition were carried by it to Oswego in the county of Labette, State of Kansas, and on or about the 24th day of March, 1904, were seized by the Sheriff of said county upon a warrant, with seizure
9 clause attached, duly issued out of the District Court of Labette County, Kansas, directed to said Sheriff, and were by him taken out of its possession, it not being a person legally authorized to sell intoxicating liquors.

Said warrant was duly issued upon the complaint of the State of Kansas, in a cause pending in said District Court wherein the State of Kansas was plaintiff and John Doe, whose true name is unknown, was defendant, being cause No. 1677 on the docket of said court. Said court had jurisdiction of said cause; was authorized to issue said warrant and said warrant was valid on its face.

On or abont the 24th day of March, 1904, a notice was duly issued out of said court notifying said defendant, John Doe, and any

and all persons claiming any interest in said package of whiskey to appear in said court at 9 o'clock A. M. on the 15th day of April, 1904, and answer the complaint made against said package of whiskey so seized, as aforesaid, and to show cause why the same should not be forfeited and destroyed. Said notice was duly served upon this defendant, and a true copy thereof duly posted in the office of this defendant where said liquor was seized.

On or about the 28th day of March, 1904, defendant duly notified plaintiff that said package of whiskey had been seized as aforesaid, and served upon plaintiff a true copy of the notice issued as aforesaid out of said District Court on the 24th day of March, 1904; and on the 31st day of March, 1904, plaintiff acknowledged receipt of said notice and advised defendant that he intended to contest the legality of said seizure.

Thereafter on or about the 15th day of April, 1904, said District Court entered a judgment duly rendered declaring said packages of whiskey forfeited and ordering same destroyed, which judgment was subsequently executed, and said package of whiskey destroyed.

Defendant files as an exhibit to this amended answer a copy of all of said proceedings and the judgment of the District Court of Labette County, State of Kansas, duly certified as provided for by the Statutes of the United States.

Defendant says that said judgment is entitled to full faith and credit under the Constitution and laws of the United States.

Wherefore defendant prays judgment and its costs herein expended.

MAXWELL & RAMSEY,
Attorneys for Plaintiff.

STATE OF OHIO, *Hamilton County, ss:*

C. G. Kingsbury, being first duly sworn says that he is the agent of the American Express Company, defendant herein, and believes that the allegations of the foregoing answer are true.

C. G. KINGSBURY.

Sworn to before me and subscribed in my presence this 12th day of February, 1906.

[SEAL.]

JOSEPH S. GRAYDON,
Notary Public, Hamilton County, Ohio.

11 EXHIBIT.

STATE OF KANSAS, *Labette County, ss:*

In the District Court in and for said County and State.

THE STATE OF KANSAS, Plaintiff,
vs.
JOHN DOE, whose True Name is Unknown, Defendant.

Information.

I, E. L. Burton, the undersigned County attorney of Labette County, Kansas, in the name and by the authority and on behalf of the State of Kansas come now here and give the Court to understand and be informed that one John Doe whose true name is unknown did on or about the 22nd day of March, A. D. 1904, in the County of Labette and State of Kansas in the lower room of a certain two story brick building located on Lot Three (3) in Block Twenty-four (24) in the City of Oswego in the County of Labette and State of Kansas, set up, keep and maintain a common nuisance and did then and there unlawfully and willfully keep and maintain a place where intoxicating liquors were received and kept for the purpose of use, barter and sale as a beverage in or about the premises above described contrary to the form and did keep for barter and sale certain boxes and jugs containing intoxicating liquors for the purpose of being sold as a beverage of the statute in such cases made and provided and against the peace and dignity of the State of Kansas.

E. L. BURTON,
County Attorney of Labette County, Kansas.

12 STATE OF KANSAS, *Labette County, ss:*

I, E. L. Burton, being duly sworn on oath say that I am County Attorney of said Labette County in the State of Kansas and that the allegations set forth in the within information are true. *She* help me God.

Subscribed in my presence and sworn to before me by E. L. Burton this 23rd day of March, A. D. 1904.

[SEAL.] J. W. WEAVER,
Clerk of the District Court.

Endorsed: No. 1677. The State of Kansas Plaintiff *vs.* John Doe Defendant. Information. Filed Mar. 23, 1904. J. W. Weaver Clerk Dist. Court.

13 STATE OF KANSAS, *Labette County, ss:*

In the District Court within and for the County and State Aforesaid.

The State of Kansas to the Sheriff of Labette County, Greeting:

Whereas, Information has been duly made and filed in the District Court in the County of Labette, in the State of Kansas, charging that one John Doe, whose true name is unknown on the 22nd day of March A. D. 1904, at and within the County and State aforesaid, did in the lower room of a certain two story brick building located on Lot Three in Block Twenty-four of the City of Oswego, in the County of Labette and State of Kansas set up, keep and maintain a common nuisance and did then and there unlawfully and willfully keep and maintain a place where intoxicating liquors were received and kept for the purpose of use, barter and sale as a beverage in or about the premises above described and did keep for barter and sale certain boxes and jugs containing intoxicating liquors for the purpose of being sold as a beverage, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Kansas.

You are therefore commanded to search the above described premises and to seize and to take into your custody all intoxicating liquors boxes, jugs and other property which you may find at said place used in the unlawful sale of intoxicating liquors, and safely keep the same subject to the order of this court.

14 Therefore, this is to command you forthwith to take the person accused, namely John Doe whose true name is unknown and bring him before the Judge or Clerk of said District Court, to be admitted to bail for his appearance at the next term of said District Court, to be held in this said County of Labette.

Given under my hand and the seal of said court this 23" day of March- A. D. 1904.

J. W. WEAVER,
Clerk District Court, Labette County.

Endorsement.

STATE OF KANSAS, *ss:*

Received the within writ on the 24 day of March 1904, and on the 24 day of March 1904, executed the same by seizing and taking into my custody 20 cases containing liquor.

Service and return	.75
Drayage	1.00
Removing goods	1.00
Total	2.75

15 In the District Court of Labette County, Kansas.

No. 1677.

THE STATE OF KANSAS, Plaintiff,
vs.
JOHN DOE, Whose True Name is Unknown, Defendant,

Notice Under Sec. 2495.

STATE OF KANSAS, *Labette County, ss:*

The State of Kansas, to John Doe, whose true name is unknown, defendant above named, and to any and all persons claiming or to claim any interest in the intoxicating liquors or other property this day seized by the Sheriff of Labette County, Kansas, in the above entitled action; and so taken by said Sheriff from the lower room of a certain two story brick building located on lot 3 in Block 24 in the City of Oswego, Labette County, Kansas, upon a warrant with seizure clause attached duly issued out of the above named court.

And you said defendant and any — all persons claiming or to claim any interest in said intoxicating liquors and other property will on the 15th day of April A. D. 1904, appear at the Court Room in the Court House in the City of Oswego, Kansas, at 9 o'clock A. M. and answer the complaint made against said intoxicating liquor and other property so taken as aforesaid, and show cause if any he or they have, why the same should not be adjudged forfeited and destroyed.

Witness my hand and the seal of said Court at my office in the City of Oswego, Labette County, Kansas, this 24th day of March A. D. 1904.

J. W. WEAVER,
Clerk District Court,
By W. A. DISCH, *Deputy.*

[SEAL.]

16 E. L. BURTON,
County Attorney.

STATE OF KANSAS, *Labette County, ss:*

I, Frank Dienst, do hereby certify that the above is a true copy of the original notice in the above action.

FRANK DIENST, *Sheriff.*

Foregoing notice endorsed as follows:

"Received this writ on the 24th day of March 1904. Delivered a copy of this writ on the 24 day of March to the Agent of the American Express Company at Oswego, Labette County, Kansas, and posted two copies in conspicuous places in the building occupied by said company.

Fees.

Service and return	.75
Three copies	.75
Total	1.50

FRANK DIENST.

No. 1677. The State of Kansas, Plaintiff, *vs.* John Doe, Defendant. Notice. Filed Mar 26 1904. J. W. Weaver, Clerk Dist. Court."

17 In the District Court of Labette County, Kansas, April 4th, April Term, A. D. 1904, First Judicial Day.

Court convened pursuant to statutory enactment.
Present: Hon. Thos. J. Flannelly, Judge, J. W. Weaver, Clerk, Frank Dienst, Sheriff, E. L. Burton, County Attorney, G. M. Huntsinger, Reporter.

April 14th, April Term, A. D. 1904, Tenth Judicial Day.

Court convened pursuant to its adjournment.
Present: Hon. Thos. J. Flannelly, Judge, J. W. Weaver, Clerk, Frank Dienst, Sheriff, E. L. Burton, County Attorney, G. M. Huntsinger, Reporter.
Thereupon the following proceedings were had among others and directed to be entered of record.

No. 1677.

THE STATE OF KANSAS, Plaintiff,
vs.
JOHN DOE, Whose True Name is Unknown, Defendant.

Now on this 14th day of April, A. D. 1904, upon the application of the plaintiff and for good cause shown it is by the Court ordered that this cause be and the same is hereby continued until the 18th day of April, A. D. 1904, as to the time and further orders under the notice heretofore given herein, and for all other purposes.

18 The foregoing duly of record in Journal 28 at page 126, of the District Court of Labette County, Kansas.

In the District Court of Labette County, Kansas, June 6th, June Term, A. D. 1904, First Judicial Day.

Court convened pursuant to statutory enactment.
Present: Hon. Thos. J. Flannelly, Judge, J. W. Weaver, Clerk, Frank Dienst, Sheriff, E. L. Burton, County Attorney, G. M. Huntsinger, Reporter.
Thereupon the following proceedings among others were had and directed to be entered of record.

No. 1677.

THE STATE OF KANSAS, Plaintiff,
vs.
JOHN DOE, Whose True Name is Unknown, Defendant.

Now on this 6th day of June, A. D. 1904, this cause came regularly on for trial upon the information filed herein, and the warrant duly issued thereon, commanding the sheriff to seize the intoxicating liquors located on certain premises described in said information and warrant, and the court finds from the examination of the files herein that the said sheriff duly seized twenty cases containing liquor, and that the said John Doe was not found and no arrest made; that within forty-eight hours after the return of said warrant by
19 the said Sheriff, a notice was duly issued to the said defendant John Doe, whose true name is unknown, and to any and all persons claiming or to claim any interest in the said intoxicating liquors so taken as aforesaid and describing the premises from which the same was taken, and the process under which said liquors were seized, and duly and properly notifying such persons to appear and answer by a time stated in said notice, the complaint filed against said liquor and show cause why the same should not be destroyed; that said notice was duly posted in a conspicuous position on the place where said property was seized, and that the defendant was not found and no service was had upon him or any other person in this case; and that no answer setting up any claim to said intoxicating liquors or any part thereof has been filed and that said defendant or any one having any interest therein, each are wholly in default of any answer or pleadings herein whatever at the time fixed for answer, or at any other time fixed by the Court, and that said cause was continued and extended from time to time.

Thereupon a trial was had in a summary manner before the court of the allegations of the complaint or information against said liquor so seized.

And thereupon the plaintiff appeared by E. L. Burton, County Attorney, and adduced evidence in support of such allegations contained in said information.

And thereupon the court further finds that said intoxicating liquors and other property and all of the same, were at the time of the filing of the information herein being used in maintaining a common nuisance.

20 It is therefore by the Court ordered and adjudged that said intoxicating liquors so seized as aforesaid be and the same is hereby forfeited and that the Sheriff in whose custody the same is, publicly destroyed the same, and that the costs hereof be paid the same as in other criminal cases

THOS. J. FLANNELLY, *Judge.*

The foregoing duly of record in Journal 28 at Page 165 of the District Court of Labette County, Kansas.

In the District Court of Labette County, Kansas.

I, Thos. J. Flannelly, Judge of the Fourteen- Judicial District in and for the County of Labette and State of Kansas do hereby certify that Edwin Potts is the Clerk of the District Court of said County, and was such clerk at the time of making and subscribing to the certificate hereto attached, and that the attestation of said Clerk is in due form of law, and by the proper officer.

THOS. J. FLANNELLY,
Judge of the Fourteenth Judicial District of the State of Kansas.

I, Edwin Potts, Clerk of the District Court of the Fourteenth Judicial District, in and for the County of Labette and State of Kansas do hereby certify that Thos. J. Flannelly, whose name is subscribed to the foregoing certificate, was at the time of sub-
21 scribing the same Judge of said District Court, duly commissioned and qualified, and that full faith and credit are due to all his official acts as such.

[SEAL.] EDWIN POTTS,
Clerk of the District Court of Labette County, Kansas.

No. 1677.

THE STATE OF KANSAS,
Fourteenth Judicial District, Labette County, ss:

I, Edwin Potts Clerk of the District Court of the Fourteenth Judicial District of the State of Kansas, sitting within and for the County aforesaid, do hereby certify the above and foregoing to be a true, full and complete copy of all papers and Journal Entries — The State of Kansas is Plaintiff and John Doe, whose true name is unknown is Defendant as the same remains on file in my office.

Witness my hand, and the seal of said Court, affixed at my office, in Oswego, this the 21st day of October, A. D. 1905.

[SEAL.] EDWIN POTTS,
Clerk of the District Court,
By GEO. T. STICE,
Deputy Clerk.

22 At a sitting of said Court on Feb. 19th, 1906:

Demr. to Answer as Amd. Filed.

"Demurrer to answer as amended filed in Clerk's office."

Said demurrer is as follows:—

Demurrer.

The plaintiff demurs to the answer as amended because it does not state facts sufficient to constitute a defence.

FENLEY & GREEN, *For Mover,*
MAXWELL & RAMSEY, *Contra.*

At a sitting of said Court on Feb. 26th, 1906:

Demurrer to Amd. Ans. Sust'd Leave Given Def't to Amend.

"The demurrer to answer as amended is sustained and defendant s given leave to amend."

At a sitting of said Court on Mar. 5th, 1906:

Def't Filed 2nd Amd. Ans.

"The defendant filed in Clerk's office 2nd amended answer."

Said 2nd amended answer is as follows:—

2nd Amd. Answer.

American Express Company, an association, erroneously sued as corporation files its second amended answer, after leave obtained rom the court and says that the packages of whiskey mentioned in he petition were carried by it to Oswego in the county of Labette, State of Kansas, and on or about the 24th day of March, 1904, were eized by the Sheriff of said county upon a warrant, with seizure lause attached, duly issued out of the District Court of Labette County, Kansas, directed to said Sheriff, and were by him taken out f its possession, it not being a person legally authorized to sell in- oxicating liquors.

Said warrant was duly issued upon the complaint of the State of Kansas, in a cause pending in said District Court wherein the State of Kansas was plaintiff and John Doe, whose true name is unknown, was defendant, being cause No. 1677 on he docket of said court. Said court had jurisdiction of said cause, vas authorized to issue said warrant, and said warrant was valid on ts face.

On or about the 24th day of March, 1904, a notice was duly is- ued out of said court notifying said defendant, John Doe, and any nd all persons claiming any interest in said packages of whiskey o appear in said court at 9 o'clock A. M. on the 15th day of April, 1904, and answer the complaint made against said packages of whiskey so seized, as aforesaid, and to show cause why the same hould not be forfeited and destroyed.

Said notice was duly served upon this defendant, and a true copy hereof duly posted in the office of this defendant where said liquor vas seized.

On or about the 26th day of March, 1904, defendant duly notified plaintiff that said packages of whiskey had been seized as aforesaid, nd served upon plaintiff a true copy of the notice issued as afore- said out of said District Court on the 24th day of March, 1904; and n the 31st day of March, 1904, plaintiff acknowledged receipt of said notice and advised defendant that he intended to contest the egality of said seizure.

Thereafter on or about the 15th day of April, 1904, said District Court entered a judgment duly rendered declaring said packages of

whiskey forfeited and ordering same destroyed, which judgment was subsequently executed, and said package of whiskey destroyed.

24 Said District Court of Labette County, State of Kansas was at all times when the transactions herein mentioned occurred a court of record, with general jurisdiction, both criminal and civil, being created and invested with such jurisdiction by the General Statutes of the State of Kansas; and said court had jurisdiction by force of the Act of May 1, 1881, as amended by the act of March 10, 1885, of the Legislature of the State of Kansas, to issue said warrant with seizure clause attached, and to enter said judgment ordering the destruction of said liquors, the same being at the times mentioned within the territory over which the jurisdiction of said court extended.

Defendant says that said judgment is entitled to full faith and credit under the Constitution and laws of the United States.

Wherefore defendant prays judgment and its costs herein expended.

MAXWELL & RAMSEY,
Attorneys for Defendant.

STATE OF OHIO, *Hamilton County, ss:*

C. G. Kingsbury, being first duly sworn, says he is the agent of the American Express Company, defendant herein, and believes that the allegations of the foregoing answer are true.

C. G. KINGSBURY.

25 Sworn to before me and subscribed in my presence this 5th day of March, 1906.

[SEAL.] JOSEPH L. LACKNER,
Notary Public, Hamilton County, Ohio.

At a sitting of said Court on March 6th, 1906:

Pl'ff Filed Demr. to Ans. as to 1st and 2nd Amended.

"The plaintiff filed in Clerk's office demurrer to answer as to first and second amended."

Said demurrer is as follows:—

Demurrer.

The plaintiff demurrers to the answer as 1" and 2" amended.

FENLEY & GREEN,
For Mover,
MAXWELL, *Contra.*

At a sitting of said Court on Mar. 12th, 1906:

Continued.

"The demurrer herein is continued until March 19th, 1906."

At a sitting of said Court on Mar. 19th, 1906:

Continued.

"The demurrer to the 1" and 2" answer as amended is continued to March 26th, 1906."

At a sitting of said Court on Apr. 2nd, 1906:

"This cause is submitted on briefs April 9th, 1906, on pending motions."

At a sitting of said Court on Mar. 4th, 1907:

Court Files an Opinion Demr. to Answer Sust'd Def't Exc.

"The Court filed an opinion. The demurrer to the answer as amended is sustained, defendant excepts."

26 Said opinion is as follows:—

Opinion.

The questions presented upon submission are:—

1. Is a common carrier liable to the owner for the loss or destruction of goods consigned, which were taken from the possession of the carrier before delivery to the consignee under a writ or process valid upon its face issued out of a court having jurisdiction, and of which seizure the carrier gave the owner immediate notice.

2. If under those circumstances the carrier is not liable, are those facts sufficiently pleaded.

The first question is simply a question of the common law liability of carrier and in this case is to be determined by the laws of either the State of Kentucky or the State of Kansas (Cleveland Cinti. & Chicago &c. Rwy. Co. *vs.* Denien 26 Ky. L. R. 103) whether under the law of Kansas or Kentucky it is unnecessary to decide, as the law of Kansas is not pleaded, and in the absence of such plea the presumption is that its construction of the common law is the same as that of the courts of our own State. If the question has not been determined by our own courts, resort must be had to the decision of courts in other jurisdiction. The question here involved has not been decided in Kentucky nor has the court been able to find any case which in any way tends to throw any light upon the question, decided by our courts, and resort to other authorities must necessarily be had. It is perhaps proper to take into consideration the fact that the policy of the laws of Kentucky is to hold common carriers to its strict common law liability, whatever that may be, and has indicated such policy by Sec. 196 of the Constitution.

PAGES MISNUMBERED

27 In the examination of this question the court has examined the following authorities.

Stiles *vs.* Davis 1 Black (U. S.) 101
Hett *vs.* Boston 69 N. H. 139
Bliven *vs.* Hudson R. Co. 36 N. Y. 403
Livingston *vs.* Miller 16 N. Y. St. 71
Thomas *vs.* Northern Pac. Ex. Co. 73 Minn. 185
Wells *vs.* Maine St. Ship Co. 29 Fed. Cas. No. 17401
Furman *vs.* Chicago R. Co. 57 Iowa 42
" " " " " " 62 " 540
" " " " " " 81 " 395
Simpson *vs.* Dufour 126 Ind. 322
Gibbons *vs.* Farrell 63 Mich. 344
McAlister *vs.* Chicago 74 Mo. 351
Nickey *vs.* St. Louis R. Co. 35 Mo. App. 79
Spiegel *vs.* Pacific Mail Co. 56 N. Y. Supp. 171
Rucker *vs.* Idaho 13 Kan. 251
The Idaho 93 U. S. 575
Mary Ann Guest Fed. Cas. No. — page 197
Kiff *vs.* Old Colony Rwy. Co. 117 Mass. 591
Merriman *vs.* Great Northern Ex. Co. 63 Minn. 543
Bennett *vs.* American Express Co. 83 Me.
Edwards *vs.* White Trans. Co. 104 Mass. 163
Robinson *vs.* Memphis &c. R. Co. 16 Fed. 27 (C. C.)
Lemont *vs.* New York L. E. & W. R. Co. 28 " 920
Ohio & M. Ry. Co. *vs.* Yohe 51 " 181
French Star Union Trans. Co. 134 Mass. 288
Pingree *vs.* Detroit L. & N. R. Co. 66 Mich. 143
28 Landa *vs.* Holck 129 Mass. 663
Jewett *vs.* Olsen 18 Or. 419
So. Rwy. Co. *vs.* Heyman 118 Ga. 616
Faust *vs.* So. Car 8 So. Car. 118
Great Western R. Co. *vs.* McComas 33 Ill. 185
Hutchinson on Carriers (Third Edition) Sec. 738-740-742
Schoulers Bailments & Carriers Sec. 428

Some of the cases above cited are of little value as well as other authorities examined by the Court. While the case of Robinson *vs.* Memphis C. R. Co. follows Stiles *vs.* Davis the latter being a very limited discussion of the question of the effect of legal process, the opinion in the former case is one of the most interesting discussions of the subject in its various aspects to be found in any of the cases.

It is impossible for this court (one of inferior jurisdiction) to discuss the various cases above cited in a written opinion. It is of *coruse* conceded that seizure under valid process, in this sense of being based upon a valid claim or right exonerates the carrier, and while there is authority for the proposition that seizure under process valid upon its face exonerates the carrier regardless of the validity of the claim or demand upon which the action was instituted, and that too perhaps without regard to the nature or character of the action, yet an examination of the authorities will show that this is

by no means a universal or dominant rule, and has often been denied. In fact, stated as a rule, the court is of the opinion that the weight as well as the reason of the better considered authorities, is against this contention.

The court too is of the opinion that the character or nature
29 of the action out of which the process issues is a material inquiry in determining the rights and duties of the carrier. The question as to whether the action involves merely the title or right of the bailor to the property, or whether it involves the validity of or right of the carrier to perform its contract of carriage ought certainly to impose different duties and obligations upon the carrier. Most, or nearly all the cases cited, in which seizure under process valid upon its face is held to exonerate the carrier are cases in which the title or right of the bailor is involved, and in those cases the reason for the ruling is often stated to be that the carrier ought not to be required to litigate as to the title of the bailor concerning which it usually has no knowledge, and ought not to be held by its contract of carriage to warrant to the bailor his own title. But the reason for the rule in those cases can have no application where the action under which the seizure is made is independent of the bailor's title, and involves or in effect infringes upon or denies the *right of the carrier* to carry the goods and deliver them to the consignor in accordance with its contract with the owner. In such cases the carrier does not litigate for the owner of the goods, but for itself and in defense of its right to perform its own contract and its duty as a carrier to the public. As said in Robinson *vs.* Memphis C. R. Co. 16 Fed. R. 57 that where the delivery is under process independent of the consignee or through him there is more reason for holding that the carrier delivers at his peril and that the carrier has not discharged its obligation by simply delivering to the officer or
30 by standing idly by until process has impounded the goods.

To inquire the owner of the goods to litigate in such instances would be to require him to litigate for the carrier and defend the carriers contractual rights.

The court does not mean to say that the carrier should resist the officer or civil authorities in such cases, but that it is its duty to reclaim the goods by legal process, or contest in good faith the right of the complainant to confiscate or destroy them, and that if by neglect or failure to do so the goods are confiscated and destroyed it is liable to the owner. From the statements in the answer it is to be inferred that the goods were seized while in transit under some police regulation and statute of the State of Kansas, and that the defendant did nothing to reclaim them, or resist their confiscation.

It was held in Rhodes *vs.* Iowa 170 U. S. 412 that the goods had arrived within the meaning of Wilson act when they had arrived at their destination and been delivered to the consignee, and notwithstanding the 118 Ga. case and the 83 Me. case undertake to say that the statement as to the delivery to the consignee was a dictum yet that court has never, if it has had occasion to, indicate any different meaning than what those words import and this court presumes it means what it said.

Under the decision of
Bowman *vs.* Chicago Rwy. Co. 125 U. S. 465
Vance *vs.* Vanderhook Co. 170 U. S. 438
Rhodes *vs.* Iowa 170 U. S. 412
Leisy *vs.* Hardin 135 U. S. 122
American Express Co. *vs.* State of Iowa 196 U. S. 133
31 Adams Express Co. *vs.* Iowa 196 U. S. 147

it is clear that goods shipped from one state to another are not whi in transit, or until delivery to the consignee subject to the poli power of the State, and any statute of a state that directs or a thorizes their seizure or destruction as a police regulation before t transit is ended is unconstitutional and void.

It is apparent under these repeated decisions of the Court of la resort and the answer in this case that the seizure in this case w illegal and void, and that the rendition of the judgment confiscati them was due solely to the failure and neglect of the carrier to d fend its rights as a carrier, and to resist the action.

At this point the court is met with the assertion that in arrivi at this conclusion it has in effect declared the Statute of the Sta of Kansas unconstitutional and the proceedings under which t goods were confiscated void, whereas the judgment of the Kans Court adjudged them valid, and that a failure to give them t same valid effect would be to deny to the judicial proceedings another state full faith and credit, which is commanded to be giv by the Constitution of the United States.

The court is of the opinion that the conduct of the defendant permitting the goods to be seized and destroyed under a judgme by default, as disclosed by its answer, without defending and a serting its rights as a carrier, which its duty as carrier required to do is in effect a fraud, and certainly no judgment suffered to rendered by the consent connivance or fraud of the carrier can relied upon to relieve the person by whose consent connivan
32 or fraud it was rendered from a legal obligation.

The carrier in its relation to the public contracts to car the goods of the consignor safely and deliver to the consignee it bound to know, and in this case certainly knew from oft repeat decisions of the Supreme Court, the limits of their rights to contra and carry the goods. It represents to its consignors that it has t legal right to contract to carry the goods, and to carry out that co tract, and in fact it has the right to do so, and the court can s no hardship in the rule that they for the protection of those wi whom they deal the owners of the goods, be held to the duty asserting and enforcing by the laws the rights which they have carry the goods of their bailors, and if they fail to do it and reason of the failure or neglect goods entrusted to them are seiz and destroyed they should not be permitted to interposed for th protection a judgment which by their consent, connivance a fraud it had been permitted to be rendered, and which in effect nies the legal right of carriage which it has, and because of whi the goods are destroyed.

The Court is further of the opinion that where the jurisdiction of the subject matter of the action is wholly dependent upon the Statute of another state the Statute should be pleaded.
Black on Judgments Vo. 2 Sec. 896.

But the demurrer should be sustained not only for that reason but for the more substantial ones heretofore given."

33 At a sitting of said Court on Mar. 13th, 1907:

Plff Filed Mo. for Judgment.

"The plaintiff filed in Clerk's office, a motion for judgment."

Said motion is as follows:—

Motion.

The plaintiff moves for judgment.
FENLEY & GREEN, *For Mover,*
MAXWELL & RAMSEY, *Contra.*

At a sitting of said Court on Mar. 18th, 1907:

Continued.

"The motion to submit for judgment is continued."

At a sitting of said Court on Mar. 25th, 1907:

Submitted.

"The defendant, declines to plead further herein the cause is now submitted for judgment.

Judgment.

It is therefore adjudged that the plaintiff A. R. Mullins recover of the defendant American Express Company, the sum of Eighty ($80.00) dollars with interest from September 11th, 1905, until paid, and his costs herein expended."

At a sitting of said Court on Apr. 5th, 1907:

Def't Filed Petition for Writ of Error, &c.

"Came the defendant herein and filed in open court, its Petition for a Writ of Error and assignment of errors herein.

Order.

On consideration of the application of the defendant for a writ of error herein from the Supreme Court of the United States, it is

ordered by the court, being the highest court of the state in which a decision in this suit can be had, that said writ of error be, and the same hereby is, granted to operate as a supersedeas on the
34 defendant's giving bond, conditioned according to law in the sum of one thousand dollars."

Said petition is as follows:—

Petition.

To the Honorable M. L. Harbeson, Judge of the Circuit Court of Kenton County, Kentucky:

American Express Company prays for a writ of error from the Supreme Court of the United States to review a final judgment in this court rendered against your petitioner in the suit above entitled, on the 25th day of March, 1907, by the circuit court of Kenton County, Kentucky, that being the highest court of the State in which a decision in the suit could be had, and assigns as error:

1. That said judgment of the Kenton Circuit Court refused and denied full faith and credit to the judgment and judicial proceedings of the district court of Labette County, Kansas, in violation of Article Four, Section One, of the Constitution of the United States.

2. That the court erred in holding and deciding that the seizure of the packages of liquor for failure to deliver which the plaintiff sought to recover from the defendant in this suit, and the judgment of the district court of Labette County, Kansas, ordering the forfeiture and destruction of said packages of liquor, and the execution of said judgment, constituted no defense to the claim of the plaintiff in said suit, and that said order and decision of the Kenton Circuit Court of Kentucky denied and refused full faith and credit to said judgment and judicial proceedings of the district court of Labette County, Kansas, in violation of Article Four, Sec-
35 tion One, of the Constitution of the United States.

3. That the court erred in holding and deciding that said judgment of the district court of Labette County, Kansas, was rendered by the consent, connivance and fraud of defendant.

4. That the court erred in sustaining the demurrer of the plaintiff to the second amended answer of the defendant.

American Express Company therefore prays that the judgments of the circuit court of Kenton County, Kentucky, may be reversed.

AMERICAN EXPRESS COMPANY,
By Its Attorneys LAWRENCE MAXWELL, JR.,
JOSEPH S. GRAYDON.

At a sitting of said Court on Apr. 6th, 1907:

Def't Filed Writ from U. S. Ct. Court.

"Came the defendant and filed in open court, a writ, from the United States Circuit Court, for the Eastern District of Kentucky directing the Clerk of this Kenton Circuit Court to certify to the

Supreme Court of the United States, a true and complete transcript of the record and proceedings had in this case.

Def't Filed Bond.

The defendant, presented in open court, a Bond conditioned according to law, in the sum of One Thousand Dollars, with the American Surety Company, as Surety herein, which Bond being examined by the Court, is now approved and filed."

36 Said Writ is as follows:—

Writ.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Kenton Circuit Court, Commonwealth of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Kenton County, Kentucky before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between A. R. Mullins, Plaintiff and American Express Company, Defendant, wherein was drawn in question the validity of a trea-y or statute of, or an authority exercised under, said State, on the ground of their — repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Consti-ution, or of a treaty or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said American Express Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the
37 same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 5th day of April, in the year of our Lord one thousand nine hundred and seven.

JOS. C. FINNELL,
Clerk of the Circuit Court of the United States for the Eastern District of Kentucky.
[SEAL.] J. W. MENZIES, *D. C.*

Allowed by
M. L. HARBESON,
Presiding Judge of the Kenton Circuit Court, Commonwealth of Kentucky.

38 Said Bond is as follows:—

Bond.

Know all men by these presents, That we American Express Company, as principal and American Surety Company of New York as sureties, are held and firmly bound unto A. R. Mullins in the full and just sum of One Thousand Dollars ($1000.00) to be paid to the said A. R. Mullins, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of April in the year of our Lord one thousand eight hundred and ninety seven.

Whereas, lately at a session of the Circuit Court of Kenton County, Kentucky, in a suit depending in said Court, between A. R. Mullins, plaintiff and American Express Company, defendant a judgment was rendered against the said American Express Company and the said American Express Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit and a citation directed to the said A. R. Mullins citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said American Express Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

39 Sealed and delivered in presence of—
AMERICAN EXPRESS CO., [SEAL.]
By C. G. KINGSBURY. [SEAL.]
AMERICAN SURETY COMPANY OF NEW YORK, [SEAL.]
[SEAL.] By HERBERT JACKSON, *Res. Vice Pres't.*

Attest:
JOHN R. BULLOCK,
Res. Ass't Sec'y.

Approved by—
M. L. HARBESON,
Judge of Kenton Circuit Court, Commonwealth of Kentucky.

At a sitting of said Court on Apr. 8th, 1907:
"The defendant filed in Clerk's office an affidavit."
Said affidavit is as follows:—

UNITED STATES OF AMERICA, *ss:*

To A. R. Mullins, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of Kenton County, Kentucky, wherein American Express Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

40 Witness the Honorable M. L. Harbeson, Presiding Judge of Kenton Circuit Court, Commonwealth of Kentucky, this 5th day of April, in the year of our Lord one thousand nine hundred and seven.

M. L. HARBESON,
Presiding Judge of Kenton Circuit Court, Kentucky.

On this 8th day of April in the year of our Lord one thousand nine hundred and seven, personally appeared Joseph S. Graydon before me, the subscriber and makes oath that he delivered a true copy of the within citation to W. M. Fenley, Att'y for A. R. Mullins.

JOSEPH S. GRAYDON.

Sworn to and subscribed the 8th day of April, A. D. 1907.

FRANK A. DROEGE.
[SEAL.] *Clerk Kenton Circuit Court.*

41 COMMONWEALTH OF KENTUCKY,
Sixteenth Judicial District, Kenton County, sct:

I, Frank A. Droege, clerk of the circuit court for said county and district in said State, certify that the preceding Forty (40) page contain a complete and true transcript of the Record in the cause mentioned in the caption thereto.

Given under my hand and the seal of said court this 19" day of April, 1907.

[Seal Kenton Circuit Court, Kentucky.]

FRANK A. DROEGE, *Clerk.*
CAMPBELL ELLIS, *Deputy.*

COMMONWEALTH OF KENTUCKY,
Sixteenth Judicial District, Kenton County, sct:

I, M. L. Harbeson, judge of the said judicial district of said State, and by virtue of said office, sole judge of said circuit court, certify

that Frank A. Droege was at the date of the foregoing certificate and is now the clerk of said court, and Campbell Ellis his deputy, duly appointed and qualified; that the signature of said Campbell Ellis to said certificate is genuine and that said certificate and the seal of said court thereto affixed are in due form of law and executed and affixed respectively by the proper officer.

Witness, my hand, as judge as aforesaid, this 19" day of April, 1907.

M. L. HARBESON, *Judge.*

COMMONWEALTH OF KENTUCKY,
Sixteenth Judicial District, Kenton County, set:

I, Frank A. Droege, clerk of the circuit court for said county and district, in said State, certify that M. L. Harbeson, whose genuine signature appears to the next foregoing certificate, was at the date thereof and is now, judge of said judicial district of said State, and sole judge of said circuit court.

Given under my hand and the seal of said court, this 19" day of April, 1907.

[Seal Kenton Circuit Court, Kentucky.]

FRANK A. DROEGE, *Clerk.*
CAMPBELL ELLIS, *Deputy.*

42 UNITED STATES OF AMERICA, *ss:*

Filed in Clerk's Office, Apr. 8, 1907. Frank A. Droege, Clerk.

To A. R. Mullins, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of Kenton County, Kentucky, wherein American Express Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable M. L. Harbeson, Presiding Judge of Kenton Circuit Court, Commonwealth of Kentucky, this 5th day of April, in the year of our Lord one thousand nine hundred and seven.

M. L. HARBESON,
Presiding Judge of Kenton Circuit Court, Kentucky.

43 On this 8th day of April, in the year of our Lord one thousand nine hundred and seven, personally appeared Joseph S. Graydon before me, the subscriber, and makes oath that he delivered

a true copy of the within citation to W. M. Fenley, att'y for A. R. Mullins.

JOSEPH S. GRAYDON.

Sworn to and subscribed the 8th day of April, A. D. 1907.

[Seal Kenton Circuit Court, Kentucky.]

FRANK A. DROEGE,
Clerk Kenton Circuit Court.

44 UNITED STATES OF AMERICA, *ss:*

C., L. and Eq. Div. Filed in Open Court Apr. 6, 1907. F. A. Droege, Clerk.

The President of the United States of America to the Honorable the Judges of the Kenton Circuit Court, Commonwealth of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Kenton County, Kentucky, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between A. R. Mullins, plaintiff, and American Express Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution,
45 or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said American Express Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 5 day of April, in the year of our Lord one thousand nine hundred and *131*.

[Seal Circuit Court, Ky. Dis., U. S. of America.]

JOS. C. FINNELL,
Clerk of the Circuit Court of the United States
for the Eastern District of Kentucky.
J. W. MENZIES, *D. C.*

Allowed by
M. L. HARBESON,
Presiding Judge of the Kenton Circuit Court,
Commonwealth of Kentucky.

46 [Endorsed:] 8302. A. R. Mullins *vs.* American Express Co.

Endorsed on cover: File No. 20,697. Kentucky, Kenton county, circuit court. Term No. 77. American Express Company, plaintiff in error, *vs.* A. R. Mullins. Filed May 4th, 1907. File No. 20,697.

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 77.

AMERICAN EXPRESS COMPANY, *Plaintiff in Error*,

vs.

A. R. MULLINS.

In Error to the Circuit Court of Kenton County, Kentucky.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This was an action in the circuit court of Kenton county, Kentucky, by Mullins against the American Express Company to recover the value of twenty packages of whiskey which the plaintiff delivered to the defendant at Covington, Kentucky, on March 19, 1904, to carry C. O. D. to Oswego, Labette county, Kansas. Each package was consigned to a separate consignee. The petition alleged that the defendant failed to deliver the whiskey, or to collect the money therefor, or to return the whiskey to the plaintiff.

The defendant answered that it carried the whiskey to Oswego, where it was seized and taken out of its possession by the sheriff of the county under a warrant with seizure clause attached, duly issued by the district court of the county, in a cause therein pending, in which the State of Kansas was plaintiff and John Doe, whose true name is unknown, was defendant, and that it was destroyed in pursuance of a judgment duly rendered by the court declaring the whiskey forfeited and ordering it destroyed. The answer alleged that the district court of Labette county had jurisdiction of the cause and was authorized to issue the warrant and that it was valid on its face; that a notice was duly issued out of the court notifying the defendant, John Doe, and any and all persons claiming any interest in the whiskey to appear at a day and hour named to answer the complaint made against the whiskey and show cause why it should not be forfeited and destroyed; that the notice was duly served on the American Express Company and a true copy posted in its office where the whiskey was seized; that the company promptly notified Mullins of the seizure and served on him a copy of the notice issued by the court, and that he acknowledged receipt thereof on March 31, 1904, which was fifteen days before the day set for answer, and advised the company that he intended to contest the legality of the seizure. The answer further alleged that the district court of Labette county was a court of record with general jurisdiction, civil and criminal, and had jurisdiction to issue the warrant, and to render the judgment ordering the whiskey destroyed, which at the times mentioned was within the territorial jurisdiction of the court. The answer set up that the judgment was entitled to full faith and credit under the Constitution and laws of the United States. See the second amended answer filed by leave (R. 13), to which a demurrer was sustained (R.

15), and the defendant declining to plead further, judgment was rendered against it for $80.00, the alleged value of the whiskey (R. 19).

The court, in a written opinion, placed its decision on the ground that the defendant could not rely on the Kansas judgment, because it had been rendered by its consent, connivance and fraud (R. 18), wholly ignoring the averment of the answer that defendant duly notified plaintiff that the whiskey had been seized, and served on plaintiff a copy of the notice issued by the Kansas court, and that plaintiff acknowledged receipt of the notice fifteen days before the time set for hearing, and advised defendant that he intended to contest the legality of the seizure (R. 13).

ASSIGNMENT OF ERRORS.

The jurisdiction of this court is invoked on the ground that the Kenton circuit court refused to give to the judgment and judicial proceedings of the district court of Labette county, Kansas, the full faith and credit to which they are entitled under article IV, section 1, of the Constitution of the United States, which provides that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State," and under section 905 of the Revised Statutes of the United States, which provides that such records and judicial proceedings "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

Specific assignments of error were filed below with the petition for the writ of error (R. 20).

ARGUMENT.

I.

This court has jurisdiction.

The case is brought here direct because the Kenton circuit court is the highest court of the State in which a decision can be had, as is recited in the order of the court allowing the writ of error (R. 19, 20). Appeals can not be taken to the court of appeals of Kentucky if the value in controversy be less than two hundred dollars. Ky. Stat. 1903, Sec. 950.

The federal question was duly raised in the court below. In contending by its answer that the judicial proceedings of the district court of Labette county, Kansas, were entitled to full faith and credit under the Constitution and laws of the United States, and in setting up those proceedings as a defense to plaintiff's suit, defendant claimed a right, privilege or immunity under the Constitution and laws of the United States, which on proof of the issues raised by the answer would have led to a judgment for defendant, if its construction of the Constitution and laws of the United States is correct. The order sustaining the demurrer to the answer deprived defendant of the right to offer proof in its support and denied the federal rights therein specially set up and claimed. In Green vs. Van Buskirk, 7 Wall. 139, 145, Mr. Justice Davis said:

"It was insisted on the one side and denied on the other, that the faith and credit which the judicial proceedings in the courts of the State of Illinois had by law and usage in that State, were denied to them by the Supreme Court of New York, in the decision which was rendered.

Whether this was so or not, could only be properly considered when the case came to be heard on its merits; but

this court, in denial of the motion to dismiss, held that the Supreme Court of New York necessarily decided what effect the attachment proceedings in Illinois had by the law and usage of that State; and as it decided against the effect which Green claimed for them, this court had jurisdiction, under the clause of the Constitution which declares that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings in every other State,' and the act of Congress of 1790, which gives to those proceedings the same faith and credit in other States, that they have in the State in which they were rendered."

In Hancock National Bank vs. Farnum, 176 U. S. 640, 642, where plaintiff brought suit in Rhode Island against a stockholder in a Kansas corporation against which plaintiff held an unsatisfied judgment, and a demurrer to the petition was sustained and judgment entered for defendant, Mr. Justice Brewer said:

"The plaintiff's contention that these Federal provisions required a decision different from that made by the state court was distinctly presented and ruled against. The jurisdiction therefore, of this court, is clear. It may examine and inquire whether any right secured by these provisions was denied by the state court, though if it finds that no such right was denied, the judgment will have to be affirmed, no matter what may be the opinion of this court as to the correctness of the ruling as a question of general law."

In St. Louis, Iron Mountain and Southern Railway Company vs. Taylor, 210 U. S. 281, 293, Mr. Justice Moody said:

"Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of

the State, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him."

II.

Mullins is bound by the Kansas judgment. The proceedings were in rem, and he had actual notice.

The answer shows that the proceedings in the district court of Labette county were in rem; that the court had jurisdiction, and that the steps necessary to make its judgment binding on all the world were taken, notice having been served on the thing seized, and on those in possession of it, and proclamation having been duly made giving opportunity to all persons claiming an interest in the property to appear and be heard. The answer in this case alleges that defendant on March 26, 1904, "duly notified plaintiff that said packages of whiskey had been seized as aforesaid, and served upon plaintiff a true copy of the notice issued as aforesaid out of said district court on the 24th day of March, 1904, and on the 31st day of March, 1904, plaintiff acknowledged receipt of said notice and advised defendant that he intended to contest the legality of said seizure." (R. 13.) This meant, of course, that he would appear and defend the case, since he could not in any other manner contest the validity of the seizure.

In State vs. McManus, 65 Kans. 720, 724, 725, the court, after quoting the sections of the Kansas statutes relating to the seizure and condemnation of intoxicating liquor, said:

"By the plain and unmistakable provisions of these sections, the property so kept and used is tried in a proceeding in rem, regardless of whether there has been an arrest or conviction of the person charged with maintaining such place."

And again, p. 725:

"Many states of the Union have had such laws as the one in question in their statutes, and have enforced them, for the last half century. Such provisions have always been upheld where they have observed the guaranteed rights of persons and property in providing notice of the seizure of the property, the means by which the owner is to be informed, when and where and before whom the warrant is to be returned, and afforded him an opportunity to defend his property. This statute observes these rights, and has made sufficiently ample provisions for the protection of property."

In The Mary, 9 Cranch, 126, 144, Chief Justice Marshall said:

"The whole world, it is said, are parties in an admiralty cause; and therefore, the whole world is bound by the decision. The reason on which this dictum stands will determine its extent. Every person may make himself a party and appeal from the sentence; but notice of the controversy is necessary, in order to become a party, and it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally, or by publication; where they are in rem notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable because it is necessary, and because it is the part of common prudence for all those who have any interest in it, to guard that interest, by persons who are in a situation to protect it. Every person, therefore, who could assert any title to The Mary, has constructive notice of her seizure, and may fairly be considered as a party to the libel."

The Kansas statute provides as follows:

"In all prosecutions, either under the state laws or under municipal ordinances, for maintaining a common nuisance as

hereinbefore defined, the finding of intoxicating liquors in the possession of one not legally authorized to sell the same, except in a private dwelling house not used in connection with a place of business, shall be prima facie evidence that such liquors are kept for sale or use in violation of law."

In State vs. Sheppard, 64 Kans. 451, the court held that the foregoing section was within the constitutional power of the Legislature, and in McManus vs. State, 65 Kans. 720, it held that the provisions for seizure and condemnation were valid.

III

The Kansas judgment forfeited the whiskey, and made it impossible for defendant to deliver or return it. Its validity and effect is denied in Kentucky if defendant is nevertheless held liable there for failing to do what the Kansas judgment prevented it from doing.

We have seen that the Kansas suit was a proceeding in rem, and that the seizure and condemnation were valid there, and that by the rules of law governing proceedings in rem, they are binding on all persons everywhere. By the Constitution and laws of the United States the Kenton circuit court was required to give those proceedings "the same credit, validity and effect" that they would have in Kansas, to use the words of Chief Justice Marshall in Hampton vs. McConnell, 3 Wheat. 234, 235, repeated in numerous decisions of this court from that time down to Fauntleroy vs. Lum, 210 U. S. 230, 236, decided at the last term.

What is the effect of such a seizure and condemnation? The answer is found in many cases involving shipments taken by judicial process from the possession of a carrier or other bailee.

Stiles vs. Davis, 1 Black, 101, was an action in trover against a common carrier for goods which had been attached while in his possession. The court below charged the jury that any proceedings in the state court to which the plaintiffs were not parties and of which they had no notice did not bind them or their property, and that the garnishment of the goods as the property of third persons constituted no bar to the action. This court speaking by Mr. Justice Nelson said:

"We think the court below erred. After the seizure of the goods by the sheriff, under the attachment, they were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it, even admitting the goods to have been, at the time, in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until disposed of under the judgment upon the attachment. It is true that these goods had been delivered to the defendant, as carriers, by the plaintiffs, to be conveyed for them to the place of destination, and were seized under an attachment against third persons: but this circumstance did not impair the legal effect of the seizure or custody of the goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them, was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs. The law on this subject is well settled."

In Wells vs. Maine Steamship Co. 4 Cliff, 228; Fed. Cas. No. 17401, which was an appeal from the district court, heard by Mr. Justice Clifford, liquors shipped by libellant from New York on one of respondent's steamers destined to Portsmouth, N. H., were seized by a deputy sheriff in the carrier's warehouse at Portland, Maine, where they were awaiting further transportation to destination. The seizure was on the ground that the liquors were kept and

intended for sale in the State in violation of law. After the seizure, the sheriff filed a libel against the liquors in the state court, and after monition and service they were adjudged forfeited by default, and were destroyed. The libel in the United States district court was to recover the value of the liquors, on the ground that the respondents were liable as common carriers, notwithstanding the seizure and destruction.

Mr. Justice Clifford, in affirming the decree of the district court dismissing the libel, said that the evidence showed that the libellant "was seasonably apprised of the legal proceedings for the forfeiture of the liquors, and that he has no just right to complain that the respondents were guilty of any negligence in affording him prompt information in that behalf." He cited Stiles vs. Davis, 1 Black, 101; Edwards vs. White Line Transit Co., 104 Mass. 159; Bliven vs. Hudson River Co., 35 Barb. 191, affirmed in 36 N. Y. 403, and held that the seizure and condemnation in the State court were a complete defense.

In Bliven & Mead vs. Hudson River Railroad Co. 36 N. Y. 403, 407, the court held that "The common carrier is exonerated from his obligation to his bailor, where the property of the latter is taken from him by due legal process, provided the bailor is promptly notified of such taking."

Scott vs. Shearman, 2 W. Bl. 976, a leading case often referred to, was an action in trespass in Westminster Hall against custom-house officers for breaking into plaintiff's house and seizing liquors stored therein. Defendants gave in evidence a copy of the record of condemnation of the same liquors in the court of exchequer. Plaintiff contended that the record in the condemnation was not a bar to the action of trespass, but the court held that "the condemnation in the exchequer was conclusive evidence in an action of trespass for seizing the goods condemned." Blackstone, J., said, p. 978:

"I at first inclined to think that brother Glyn's distinction was right: and that the condemnation upon default of the owner might be conclusive in rem, so that the right of the Crown to the goods should never be contested again; but not conclusive in personam, in case the owner could prove they were not in fact seizable, and chose to bring an action against the person seizing, for damages by way of collateral remedy. But, upon full consideration, I am now convinced, that there was no ground for such a distinction. The only possible ground that the plaintiff can rely on in the present case, which is unaccompanied with misbehavior, or any unwarrantable violence, is, that the goods were not in truth liable to be seized by the laws of the customs; although, by the plaintiff's default, they have been condemned in the Exchequer. But I take this condemnation to be conclusive evidence to all the world, that the goods were liable to be seized; and that therefore this action will not lie.

1. Because of the implicit credit which the law gives to any judgment in a court of record, having competent jurisdiction of the subject matter. The jurisdiction of the court of exchequer in this case is not only competent, but sole and exclusive. And though it be said that no notice is given to the owner in person, and that therefore he is not bound by the condemnation, not being a party to the suit, yet the seizure itself is notice to the owner, who is presumed to know whatever becomes of his own goods. He knew they were seized by a revenue officer. He knew they were carried to the King's warehouse. He knew, or might have known, that by the course of law, the validity of that seizure would come on to be examined by the court of exchequer, and could be examined nowhere else. He had notice by the two proclamations according to the course of that court. He had notice by the writ of appraisement, which must be publicly executed on the spot where the goods were detained. And having neglected this opportunity of putting in his claim, and trying the point of forfeiture, it was his own laches and he shall forever be concluded by it, not only with respect to the goods themselves, but every other collateral remedy for taking them. For it

would be nugatory to debar him from recovering directly the identical goods that are condemned, if he is allowed to recover obliquely damages equivalent to their value. * * * But the legal decision of this question does not rest on theory or analogy only. It hath been determined over and over in the very point. Vanderbergh and Blake, Tr. 13, Car. 2, in the Exchequer, Hardr. 194, it was held, that the seizure and proclamation are sufficient notice to the owner; and that neither trover nor action for malicious information, nor other action which may blow off the judgment by a side wind, will lie after a condemnation in the Exchequer."

In a note to this case the reporter says, p. 982:

"In Geyer vs. Aguilar, 7 T. R. 696, Lord Kenyon said that Lord Mansfield always acted upon the opinion, that on a condemnation of goods in the Exchequer, the judgment of that court was conclusive. The record of condemnation of rum, as adulterated, is evidence to prove the fact of its being adulterated, in an action between different parties; but the record of conviction for penalties is not: the former being a judgment in rem, the latter only in personam; Hart vs. McNamara, 4 Price, 154, n."

In Buchanan vs. Biggs, 2 Yeates, 232, which was a suit in trespass for seizure of whiskey in possession of defendant which had been condemned in regular proceedings under the United States laws, of which plaintiff had notice, but in which he did not appear, it was held that:

"This court can not enter into the inquiry, whether the six casks of whiskey were legally seizable or not. It appears by the judgment of a proper tribunal, having full and competent jurisdiction of the matter in question, that the whiskey was condemned as forfeited. That sentence is conclusive against the present plaintiff, and can not be unravelled or revised in any state court, on principles of established law and sound policy. The plaintiff might have contested the seizure in the district court of Virginia, by filing his claim there: and having failed to do so, he is precluded

from trying the question in this collateral way. This is no new case. 2 Blackst. Rep. 977, Hard. 194, T. Raym. 336, Carth. 323, 327, 12 Vin. Abr. 95. Authorities may be found in books where the present doctrine is pointedly asserted."

Ohio and Mississippi Railway Co. vs. Yohe, 51 Ind. 181, was an action for damages for breach of a contract of shipment, in which the court stated the question to be:

"Is a common carrier of goods excused from liability for not carrying and delivering the goods, when they are, without any act, fault or connivance on his part, seized by virtue of legal process, and taken out of his possession?"

It was held that the carrier was exonerated, the court citing Stiles vs. Davis, 1 Black. 101, and other cases, and saying:

"It is impossible for the carrier to deliver the goods to the consignee, when they have been seized by legal process and taken out of his possession. * * * Nor do we think he is bound when goods are so taken out of his possession, to follow them up and be at the trouble and expense of asserting the claim thereto of the party to or for whom he undertook to carry them. We do not think it material what the form of process may be. In every case the carrier must yield to the authority of legal process. * * *

The right of the sheriff to hold the goods involved questions which could only be determined by the tribunal which issued the process or some other competent tribunal, and the carrier had no power to decide them. If the goods were wrongfully seized, the plaintiffs have their remedy against the officer who seized them, or against the party at whose instance it was done. * * *

It makes no difference we think, that the process was issued by a tribunal of a state different from that in which the plaintiffs reside. The rule must be the same as in a case where the process emanates from a court in the state of the plaintiff's residence.

It can not be denied that the carrier must obey the laws

of the several states in which it follows its calling. The laws of Illinois which give force and effect to a writ of replevin must be obeyed. It can not say to the sheriff, who is armed with a writ issued in due form of law, commanding him to take the property, that it has executed a bill of lading, and thereby agreed to transport the property to another state, and therefore he can not have it. The sheriff would have the right and it would become his duty, to call out the power of the county to aid in serving his lawful process.

The carrier is deprived of the possession of the property by a superior power, the power of the state—the vis major of the civil law—and in all things as potent and overpowering as far as the carrier is concerned, as if it were the 'act of God or the public enemy.' In fact, it amounts to the same thing; the carrier is equally powerless in the grasp of either."

In Savannah, etc., Railroad Co. vs. Wilcox, Gibbs & Co. 48 Ga. 432, which was an action on a contract for non-delivery, to which defendant pleaded seizure of the goods under a writ, in attachment proceedings against plaintiffs, the court said:

"It is true the text books, including our code, do announce that a common carrier can set up no excuse for the loss or destruction of goods but the act of God or the enemies of the state. But this has always been qualified with certain limitations as to when his liability ceases, when he is discharged from further prosecution of his undertaking, as if the owner of the goods himself receives them short of the place of destination, or if they are not delivered by the fault of the owner; or that they have been taken from the carrier by title paramount, and lastly, that they have been taken from him by legal process. He has not lost the goods; they have not been stolen or been destroyed, but his undertaking as a carrier has been determined: Redfield on Carriers, Sec. 24, note; see also same book, 245; 18 Vermont, 186; 11 Vermont, 323; 1 Duer, 79; 37 Barbour, 112."

In Railroad Company vs. O'Donnell, 49 Ohio St. 489, 501, the court said:

"The rule seems to be now established, that a common carrier is not liable, if the goods be taken from his possession by legal process against the owner, or if, without his fault they become obnoxious to the requirements of the police power of the state, and are injured or destroyed by its authority; as where they are infected with contagious disease, or are intoxicating liquors intended for use or sale in violation of the laws of the state, which require their seizure and destruction. Wells vs. Steamship Co. 4 Cliff. 228; Bliven vs. Railroad Co. 36 N. Y. 407. But, in order to protect the carrier in such cases, it is necessary that the seizure be made without the procurement or connivance of the carrier; that the proceeding or process under which it was made appear to be valid, and that the carrier give prompt notice to the owner. Gibbons vs. Farwell, 63 Mich. 344; Kiff vs. Railway Co. 117 Mass. 591; Bliven vs. Railroad Co. 36 N. Y. 403; Railway Co. vs. Yohe, 51 Ind. 181. "The principle of the exception," it is said, in Wells vs. Steamship Co. supra, "is, that the carrier is not obliged to violate the law of the jurisdiction to comply with its contract."

Many cases are cited in Moore on Carriers, p. 229-233:

In Edwards vs. White Line Transit Co. 104 Mass. 159, the court held that it was no defense to an action against a common carrier for breach of his contract to deliver goods, that they were taken from him by an officer under an attachment against a person who was not the owner, but the court conceded (p. 162) that the defense would be good if the attachment had been against the owner, or if the seizure had been in a proceeding in rem. This distinction is commented on by Mr. Justice Clifford in Wells vs. Maine Steamship Co. Fed. Cas. No. 17401.

It is suggested in the opinion below that a different rule prevails where "the action under which the seizure is made

is independent of the bailor's title, and involves or in effect infringes upon or denies the right of the carrier to carry the goods and deliver them to the consignee" (R. 17); but no such distinction is recognized in any case, and is certainly not admissible where the seizure is in a proceeding in rem.

We carried the whiskey to Kansas by direction of the plaintiff, where it was brought within the jurisdiction of a court which adjudged that we were not entitled to deliver it, or to collect the money for it, or to return it to the plaintiff, but that we were required to turn it over to the State of Kansas for destruction. If that judgment were void it would be no protection to us, or if it were not binding on Mullins, we could not plead it against him, but it is not void. It was rendered by a court having possession of the res and jurisdiction of the subject matter, and is binding on Mullins and on us, and on the world, because the court gave the notice and pursued the forms recognized as sufficient to make a judgment in a proceeding in rem binding on all persons. It is a judgment which establishes as against the plaintiff and against all the world, the contrary of the contention that the seizure was unlawful. As the court below said, the Kansas judgment "denied the right of carriage." That indeed was its effect in Kansas, and the Kentucky court is required by the Constitution and laws of the United States to give it the same effect.

IV.

The court below ignored the allegations of the answer, in holding that plaintiff in error was precluded by negligence and fraud from relying on the Kansas judgment.

The answer averred that "defendant duly notified plaintiff that said packages of whiskey had been seized as aforesaid, and served upon plaintiff a true copy of the notice issued as aforesaid out of said district court on the 24th

day of March, 1904, and on the 31st day of March, 1904, plaintiff acknowledged receipt of said notice and advised defendant that he intended to contest the legality of said seizure" (R. 13). This meant of course that he intended to appear in the Kansas court, since he could not otherwise or elsewhere contest the validity of the seizure.

In the face of these allegations, admitted by the demurrer, the court below said (R. 18):

"The court is of the opinion that the conduct of the defendant in permitting the goods to be seized and destroyed under a judgment by default, as disclosed by its answer, without defending and asserting its rights as a carrier, which its duty as carrier required it to do, is in effect a fraud, and certainly no judgment suffered to be rendered by the consent, connivance or fraud of the carrier can be relied upon to relieve the person by whose consent, connivance or fraud it was rendered from a legal obligation."

It is doubtless true, as said by this court in Harris vs. Balk, 198 U. S. 215, 227, that one can not rely on a foreign judgment which has been procured by his negligence or fraud, but this court will examine and determine that question for itself, as it did in Harris vs. Balk, where it was claimed that the plaintiff in error had lost the right to rely upon a Maryland judgment there pleaded.

In Huntington vs. Atrill, 146 U. S. 657, 684, Mr. Justice Gray said:

"If the state court declines to give full faith and credit to the judgment of another state, because of its opinion as to the nature of the cause of action on which the judgment was recovered, this court, in determining whether full faith and credit have been given to that judgment, must decide for itself the nature of the original liability."

The principle is analagous to that in which the court has held, in cases where a contract is alleged to have been impaired by subsequent legislation, that it will put its own

construction of the contract, though it may differ from that of the state court.

The state of the pleadings in this case does not leave open the claim that plaintiff in error is precluded by fraud or negligence from relying on the Kansas judgment. Mullins had a right to appear and set up a defense, and possibly did not desire defendant to set up a defense which might be inconsistent therewith. On being informed that plaintiff intended to contest the legality of the seizure, defendant owed no duty to contest it for plaintiff. This court, therefore, in reviewing the decision of the Kentucky court that defendant has lost its right to rely on the Kansas judgment by its omission to litigate, will give due effect to the fact that plaintiff relieved defendant of that duty.

In Wells vs. Maine Steamship Co. 4 Cliff, 228. Fed. Cas. No. 17401, where a judgment of seizure and condemnation in a state court was relied upon by the respondents, who were common carriers, Mr. Justice Clifford said that the correspondence showed "to the entire satisfaction of the court that the libellant was seasonably apprised of the legal proceedings for the forfeiture of the liquors, and that he has no just right to complain that the respondents were guilty of any negligence in affording him prompt information in that behalf."

In Heyman vs. Southern Railway Co., 203 U. S. 270, 271, the carrier surrendered the goods without a warrant or other legal process and did not resist the seizure, or notify the owner. There were no judicial proceedings. It is not a case therefore in which the judgment of a court was relied on as a defense, or where the validity or effect of a foreign judgment was drawn in question.

V.

It is immaterial whether the Kansas judgment was right or wrong.

This point is settled by Fauntleroy vs. Lum, 210 U. S. 230, 237, where Mr. Justice Holmes said:

"A judgment is conclusive as to all the media concludendi, United States vs. California & Oregon Land Co. 192 U. S. 355; and it needs no authority to show that it can not be impeached either in or out of the State by showing that it was based upon a mistake of law."

The Kenton circuit court was of opinion that the judgment of the Kansas court was in conflict with the decision of this court in American Express Company vs. Iowa, 196 U. S. 133, where it was held that a C. O. D. shipment was within the protection of the commerce clause of the federal Constitution; but that decision had not been given when the Kansas judgment was entered, and the Kansas court may have relied upon the decision of the supreme court of Iowa, which held that a C.O.D. shipment was in effect a sale at the point of delivery. That judgment was reversed by this court the year after the whiskey in this case was forfeited and destroyed by the district court of Labette county.

VI.

The Kansas judgment may have been right on the facts.

The reason for the rule which prevents the Kentucky court from inquiring into the correctness of the Kansas judgment for the purpose of impeaching it for error of law or fact may be illustrated in this case by several suggestions drawn from previous decisions of this court. It may be that the Kansas judgment was right, and that the actual

transaction was not protected by the interstate commerce clause of the Constitution. Possibly the plaintiff after notifying defendant that he intended to contest the legality of the seizure changed his mind because "it may be supposed to be that he could not successfully defend." (Mr. Justice Peckham in Harris vs. Balk, 198 U. S. 215, 228.)

Section 3 of the Kansas statute, Laws of 1901, ch. 232, p. 418, provides as follows:

"The complaint or information and answer or answers that may be filed shall be the only pleadings required; and at the time fixed for answer, or at any other time then to be fixed by the court, a trial shall be had in a summary manner before the court of the allegations of the complaint or information against the liquors or other property seized; and whether any answer shall be filed or not, it shall be the duty of the county attorney to appear and adduce evidence in support of such allegations."

The presumption therefore is that evidence was adduced, and that it showed that the real transaction was not within the protection of the interstate commerce clause of the Constitution.

It may be that the situation in regard to the whiskey was similar to that suggested in Adams Express Company vs. Kentucky, 206 U. S. 129; that the consignor had no previous contract for the sale of the liquor with the consignee; that he forwarded "the liquors in the expectation that the consignee would, when informed of their arrival, take and pay for them" (p. 137), and that "the consignor was trying to evade the state statute." The court of appeals of Kentucky held that under such circumstances there was no interstate commerce entitled to protection under the Constitution, and this court indicated nothing to the contrary. Mr. Justice Harlan, dissenting, held that if such facts appeared even the common carrier would be punishable under the state

law. American Express Company vs. Kentucky, 206 U. S. 139, 141. Or it may be that there had been such a constructive delivery of the goods to the consignees as to bring the case within the distinction suggested by Mr. Justice White in Heyman vs. Southern Railway Company, 203 U. S. 270, at 276. There is nothing in this record to negative the existence of the facts suggested, and the Kentucky court, assuming that it might inquire into the correctness of the Kansas judgment, was bound to indulge every presumption to sustain it.

The Kansas court may have upheld the validity of the seizure on one of the foregoing grounds, or might have done so if the facts had been fully developed. It actually did uphold the validity of the seizure, and Mullins is estopped from denying that it was on a ground that was proper. Having had fair notice and an opportunity to defend, he is as much concluded by a judgment by default, as if he had appeared, and one or other of the issues of fact suggested had been decided against him.

We respectfully submit that the judgment should be reversed, and the case remanded with directions to enter judgment for defendant on the demurrer to the second amended answer.

LAWRENCE MAXWELL,
JOSEPH S. GRAYDON,
Counsel for Plaintiff in Error.

LEWIS CASS LEDYARD,
Of Counsel.